IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 25TH JULY 2006 / 3RD SRAVANA 1928

CRL.A.No. 2204 of 2004()

SC.346/2001 of ASSISTANT SESSIONS COURT, PAYYANNUR
CP.13/2000 of JUDL.MAGISTRATE OF FIRST CLASS COURT, TALIPARAMBA

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APPELLANT: ACCUSED NOS 1 TO 14:

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1. RAMESAN, S/O.NARAYANAN,
PACHA HOUSE, TALIPARAMBA AMSOM, POOKKOOTH THERU.

2. JAYARAJAN, S/O.BALAKRISHNAN, THOLAN
HOUSE, TALIPARAMBA, POOKKOOTH TEHRU.

3. GIREESAN, S/O.KUNHIKANNAN,
MINIKKI HOUSE, POOKKOOTH THERU.

4. RAJAGOPALAN, S/O.KANNAN MASTER,
KAIMURIYAN HOUSE, POOKKOOTH THERU, THALIPARAMBA.

5. REMANAN, S/O.NARAYABHAN,
MANOTTI HOUSE, POOKKOOTH TERU.

6. THAMBAN, S/O.NARAYANAN, POOKKOOTH TERHU,
MANNOTTI HOUSE.

7. DINESHAN, S/O/.KRISHNAN, AYYAPPAN HOUSE,
POOKKOOTH THERU.

8. SAREEJITH, S./O.,KARIVATAN LAKSHMI,
GURIKKAL, POOKKOOTH THERU.

9. BALAN, S/O.KUNHIRAMAN, PANIYAN HOUSE,
POOKKOOTH THERU.

10. VIJOY CHANDRAN, S/O.RAMACHANDRAN,
POOKKOOTH THERU.

11. SAJEEVAN, S/O.GOVINDAN,
PULLA HOUSE, POOKKOTH THERU.

12. SHIJU, S/O.BALAN, PUTHIYAMVEETTIL,
POOKKOTH THERU.

13. RAMESH BABU, S/O.KRISHNAN, POOKOTH THERU
PANCHALAN HOUSE.

14. RATHEESH KUMAR, S/O.GOPALAN,
POTTAN HOUSE, POOKKOOTH THERU.

BY ADV. SRI.N.SUKUMARAN
SRI.S.SHYAM
SRI.N.K.KARNIS
SRI.BOBBYMATHEW KOOTHATTUKULAM

RESPONDENTS:

STATE OF KERALA, REP. BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTSOR SRI. K.J. GEORGE.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25/07 /2006 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL.A. NO. 2204 OF 2004

Dated this the 25th day of July, 2006.

JUDGMENT

The appellants are convicted and sentenced for offences under Sections 143,147,148,323,324 and 307 read with Section 149 of the Indian Penal Code (`I.P.C', for short). The court below framed a charge against the accused which is extracted below:

> "That on 4.9.98 at 18.30 hours on the road near the U.P. School building at Kuttikunnuparamba, Pokkoth Theru accused 1 to 14 and about 10 others, who could be identified on sight armed with deadly weapons formed themselves into an unlawful assembly and in furtherance of their common object of causing the death of CWs 1 and 2 stabbed them with knife and beat them with wooden stick, iron rod and hands and thereafter about 250 metres away from the place of occurrence, near building No. XX-272 of Thaliparamba municipality the accused beat CW3 with an iron crowbar and stabbed him with knife and inflicted injuries on CWs 1 to 3 and attempted to commit murder and thereby you all the accused have committed the offences punishable under Sections 143,147,148,323,324 and 307 r/w Section 149 IPC within the cognizance of this court; and I hereby direct that you be tried before this court for the said offence".

2. A reading of the above charge itself would reveal that the charge is not framed in conformity with any of the relevant provisions of the code relating to framing of charge. Section 212 of the Code of Criminal Procedure (`the code', for short) provides that particulars as to time, place and person against whom the offence was committed shall be stated in the charge. Sub

section (1) of Section 212 of the code reveals that the charge "SHALL" contain such particulars (as to the time and place of the alleged offence, and the person (if any) against whom, it was committed) as are reasonably sufficient to give the accused notice of the matter with which he is charged. Section 218 of the code provides that for every distinct offence of which any person is accused, there shall be a separate charge.

3. Section 211 of the Code deals with form of charges and contents of charge. The Form of Charge referred to in Section 211 of the code is available in Form No. 32 in Schedule II of the code. It reveals that the details of each offence are to be stated with reference to the particular accused who committed the offence and the person against whom such offence is committed. It also shows that if the charge is having two or more heads, each charge must be separately detailed. Legislature intended that the court shall frame charge in such a way that the charge shall contain the necessary details of the distinct offence or offences which include date, time and place where the offence is committed and the person who committed the offence and the person against whom such offence is committed. But, the charge framed in this case is, evidently, not in compliance with the mandatory provisions contained in the code and hence, it is illegal.

4. The provisions relating to the charge are mainly founded on the valuable right of the accused to have a fair trial in criminal cases. Those

provisions are intended to ensure that no accused is prejudiced in his defence, in the absence of his knowing the real nature of allegations made against him. Those provisions are laid down to guarantee that the accused is given notice of at least the bare minimum details of the alleged acts committed by him against a particular person, for effectively defending himself. Those provisions are also set on the Principles of Natural Justice.

5. It is also relevant to mention here that if the charge is not framed in accordance with the provisions of the code, not only the accused, but the prosecution is also likely to be prejudiced because, the defect in the charge may lead to an unmerited acquittal. This is because of the reason that in certain cases, the defect in the charge may by itself vitiate the entire trial and a defective charge could be the sole reason for an acquittal. Hence, every court shall take personal effort to see that the charge is framed as per law, applying its mind to all relevant aspects. The failure to do so will result in gross miscarriage of justice, since a fair trial cannot be ensured without a charge being framed, in accordance with law.

6. The charge framed by the court below reveals that various offences are committed by 24 persons. Out of the 24, fourteen such persons alone are named in the charge and only they stood trial. Therefore, there are ten more unnamed persons who were allegedly involved in the crime. But, it is not discernible from the charge, as to which of the accused, (out of the 24 persons

named and unnamed) committed the main offence under section 307 IPC. It is only stated in the charge that the "accused" beat CW3 with iron crow bar and stabbed him with knife and inflicted injuries on CW1 to CW3 and "all accused" committed the various offences. It is also not clear from the charge, against whom, out of CW1 to CW3, offence under section 307 IPC was committed and by which accused. This is the same state of affair, as far as all other offences in the Charge are concerned.

7. The weapon used by each of the accused against each of the witness or witnesses is also not indicated in the charge. It is not stated as to which of the accused used which particular weapon and as against whom it was used. In short, there is no specific charge against any of the accused, for having committed any of the distinct offence or offences against any particular witness. It is also pertinent to note that none of the accused was in a position to know from the charge, whether he is tried for the substantive offence or whether his liability is cast under section 149 of I.P.C.

8. There can be no doubt that the charge is too vague and ambiguous with respect to the various offences allegedly committed by each of the accused under sections 143,147,148, 323, 324 and 307 of IPC. A general, vague statement of the nature made in this case by the court below under the title, `charge' does not constitute `charge' under the provisions of the code. The charge framed in this case is totally in violation of the mandatory requirements under the relevant

provisions of the code. The defects are not mere insignificant omissions or irregularities in the charge which can be ignored as immaterial under section 215 of the code. Those have caused gross failure of justice.

9. Every criminal court has the responsibility to frame charge consistent with the legal requirements under the provisions contained in Chapter XVII of the code. Every such court shall pay personal attention while framing charge. A casual, perfunctory, haphazard manner of framing of charge will result in serious miscarriage of justice and it will deprive the accused of his valuable right to have a fair trial. It will also affect the prosecution adversely, since such defect in the charge alone could be a ground for acquittal. Unmerited acquittal founded on the mere illegality of framing charge will even tell upon the accountability of criminal justice delivery system and administration of justice. If the mere failure on the part of the court in framing a proper charge were to be the reason for an acquittal, the court alone has to bear the blame and hence every court shall pay more serious personal attention to framing of charges. The duty and responsibility cast upon the court in this regard is very high.

10. The court shall also bear in mind that framing of charge shall not only give notice of the particulars of the offences to the accused, but it would also necessarily aid the court to know what exactly the charge is and what the prosecution case is. But, it appears that because of the defective charge, the trial court even failed to understand what the prosecution case is. In the

absence of specifying the overt act committed by each of the accused against each of the witness, the court was not able to appreciate either the prosecution case or the defence case.

11. This is more evident from the manner in which "points for consideration" are framed. The points for consideration raised by the trial court are quoted hereunder:

> "1. Whether the accused formed into an unlawful assembly and committed riot with deadly weapons as a member of the assembly and in prosecution of the common object of the assembly?
>
> 2. Whether the accused voluntarily caused hurt to the injured by beating with hands and by means of deadly weapons as alleged?
>
> 3. Whether the accused voluntarily caused hurt to the injured with an intention to kill the inured as alleged?
>
> 3. Whether the accused inflicted stab injuries on the injured as alleged?
>
> 5. If so, what is the punishment?"

12. The points raised for consideration do not refer to the nature of allegations or the charge levelled against each of the accused and against whom the specific overt acts were committed. With the above type of charge and points for consideration, no court will be able to appreciate the prosecution case or the defence case and reach a correct conclusion. It will also be difficult for the court to either convict or acquit the accused, to the satisfaction of the conscience of the court. The records reveal that various witnesses including the injured were examined in this case and a few witnesses were examined on the side of

the accused also. They all spoke about the incident, about the manner in which incident occurred, the places at which the incident allegedly occurred, the persons who were involved in the crime etc. etc. Even though there is evidence regarding some of the overt acts committed by some of the accused at certain places, the court below was not able to find out whether the prosecution has proved the case as set up by it. The trial court failed to enter a specific finding that any particular accused committed any particular overt act or offence against any particular witness. A conviction entered against the accused, in the absence of such a finding cannot be sustained.

13. In the light of the specific defence put forward by the accused that the incident did not occur at the alleged place of occurrence, the evidence regarding the place of occurrence also assumes importance. But, as per the finding of the court below, the incident occurred in a place other than what is alleged by the prosecution and what is stated in the court-charge also. As per the charge, the incident occurred on the road near the U.P. School building at Kuttikunnuparamba, Pokkoth Theru. According to PWs 9 and 4, the incident occurred partly inside the school. Though the charge does not disclose any part of the incident having been taken place inside the school, the court below proceeded as if, as per the prosecution case, a part of the incident happened inside the school.

14. The trial court also placed reliance upon certain materials which are

not proved in accordance with law. Many of the documents which are marked in the case are not proved as per law. A perusal of the deposition discloses a strange manner of recording of the evidence. I shall cite an example. According to prosecution, PW8 is a doctor. But his evidence does not reveal whether he is a doctor at all. It is not brought out from his evidence whether he examined any of the injured. It cannot also be inferred from his evidence whether he had prepared any of the wound certificates or issued the same, under his signature. It is also not clear whether he was marking a document prepared by another. What is recorded in the evidence of PW8, in respect of the three wound certificates which are marked in this case are as follows:

> "On 4.9.1998 at 7.05 p.m., examined a person Prakashan, aged 23 years and noted the following injuries as alleged. (1) Deep incised wound 5cm x 0.5 cm over the face (2) side in the pre auricular region above zygomatic process. Marked as Ext.P6.
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> On the same date, examined Vineeth Raghavan, aged 18 years at 7.15 p.m. and noted the following injuries as alleged:
>
> 1) Deep lacerated wound on the scalp 3cm x 0.5cm on (R) side.
> 2) Deep lacerated wound 2cm x 0.5cm on scalp adjacent to first.
> 3) Deep incised wound 2cm x 1cm over nape of neck on (2) side in posterior aspect.
> 4) Linear superficial abrasion on (2) maxillary process.
> 5) Linear horizontal superficial abrasion on (2) supra scapular area.
> 6) Linear horizontal superficial abrasion in upper

part of inter scapular area.

7) Deep incised wound 2cm x 1 cm over (2) scapula.

8) Deep incised wound 1cm x 0.5 cm over (2) infra axillary area.

9) Deep incised wound 5cm x 2cm cutting the inter costal muscles extending upto the pleura in (2) infra scapular area.

10) Deep incised wound 4cm x 0.5cm over the lateral aspect of (2) knee joint. The joint capsule is exposed. Marked as Ext. P7."

15. It is not possible from the above evidence to infer that PW8 is a doctor and that he had examined the injured in his capacity as a medical officer. It cannot also be concluded from the above evidence that Exts.P6, P7 and P8 are prepared, signed and issued by PW 8. The opinion of doctor has not been elicited, regarding any of the injuries caused or inflicted in relation to the alleged weapon used. As per the provisions of the Evidence Act, a fact can be proved by oral or documentary evidence. The evidence on opinion can also be elicited by examining an expert and by getting his opinion on scientific matters etc.

16. The oral evidence and documentary evidence adduced have to disclose the relevant aspects which are sought to be proved. In the case of documentary evidence and opinion evidence, introductory evidence which are absolutely essential has to be let in. In the absence of such evidence, it will be illegal to infer or conclude that PW8 is a doctor or that he examined the injured or that he issued the certificate. No opinion evidence is also let in. The

evidence in the case was shabbily elicited and recorded also. The court appeared to have recorded evidence in a mechanical way, without taking any effort to see that the minimum relevant details are brought out in evidence.

17. Though the court below discussed the details of evidence in the judgment which runs to pages, there are only a general and vague findings that `the prosecution case is very probable', `the evidence of eye witness is convincing and that it tallies with the medical evidence' etc. etc. But, no specific finding is arrived at as to which of the accused committed the particular offence. The lower court also failed to consider or appreciate defence version that the first accused was not involved in the offence at all.

18. To crown it all, questioning of the accused was also done in a perfunctory manner. Vague questions are put to the accused, without even stating as to which of the witness or witnesses were assaulted by a particular accused. In the absence of putting specific questions to the accused under Section 313 of the code regarding the details of the alleged acts appearing in evidence against him, he cannot be convicted for the specific offence or offences alleged against him. But even while convicting the accused, the court below did not attempt to enter any finding as to the specific nature of the overt acts if any, which are proved to have been committed by the accused. No doubt, that the conviction entered in this case, in the absence of a specific finding of guilt against each of the accused, cannot be upheld. It is not legal to convict the

accused on the basis of a mere general finding that all the accused committed various offences alleged against them.

19. In the above circumstances, all what can be done is to set aside the conviction and sentence passed against the accused, since the materials placed before me do not justify, either an order of acquittal or a conviction, to the satisfaction of this Court. An interference has therefore become inevitable because of the manner in which the charge was framed, questioning was done, points for determination were raised and evidence is recorded. The matter requires a de novo trial from the stage of framing charge, failing which, I am satisfied, both sides will be prejudiced. But none shall be prejudiced because of any fault committed by the court.

20. The conviction and sentence passed against the appellants are therefore set aside and the case is remanded to the court below for a de novo trial in the light of the observations made in this judgment. The court below shall amend the charge and dispose of the case in accordance with law. Since crime is of the year 1998, lower court shall dispose of the matter within a short span of time. It is made clear that it may not be necessary to examine all the witnesses all over again, unless prosecution or defence make a request for such examination and the court finds it essential to examine the witness again, in the light of the amended charge.

21. The lower court shall also consider the request of the accused as to

whether any one of them can be exempted from personal appearance during trial after remand in the peculiar facts and circumstances of this case.

Both the parties shall appear before the trial court on 12.02.2007 The lower court is directed to dispose of the case within two months from the date of receipt of a copy of this judgment.

This appeal is allowed.

K. HEMA, JUDGE.

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